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No. 88-630 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ALABAMA,

Petitioner,

—v.—

BENJAMIN F. COX and BENNIE J. HAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

MOTION OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI FOR ELIZABETH HOLTZMAN, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.

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Elizabeth Holtzman, District Attorney of Kings County, New York, has authority to file the attached brief *amicus curiae* pursuant to Rule 36.4, because she is the authorized law officer of a political subdivision of a state.

The National District Attorneys Association, Inc., moves for leave to file the attached brief *amicus curiae*, pursuant to Rule 36.1. Counsel for petitioner has consented to the filing of this brief. Consent was sought from counsel for respondents, but was not obtained.

Respectfully submitted,

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November 28, 1988

QUESTION PRESENTED

Whether the equal protection clause of the fourteenth amendment prohibits judicial enforcement of race-based peremptory challenges by criminal defendants and their attorneys.

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STATEMENT OF INTEREST OF AMICI CURIAE

1. Elizabeth Holtzman is the District Attorney of Kings County, New York. Since taking office in January of 1982 she has filed many briefs seeking to persuade the courts of New York and of the United States that both the state and federal constitutions prohibit prosecutors and defense counsel alike from using the peremptory challenge to exclude potential jurors on the basis of race. *See People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S.

961 (1983) (declining to adopt the ban); *McCray v. Abrams*, 576 F.Supp. 1244, 1249 (E.D.N.Y. 1983), *remanded for a hearing*, 750 F.2d 1113, 1134-35 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986) (imposing sixth amendment ban on prosecutors); *Batson v. Kentucky*, 476 U.S. 79 (1986) (imposing fourteenth amendment ban on prosecutors); *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988), *appeal docketed* (2d Dep't March 21, 1988) (action for declaratory judgment extending ban to defense counsel).

Throughout the same seven-year period—including the period before this Court first made clear in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), that prosecutors are prohibited from exercising race-based peremptory challenges—District Attorney Holtzman has forbidden her staff from engaging in that practice, and has taken internal administrative steps to enforce that prohibition. During the same period she has instructed her staff to report to her instances where defense counsel appear to be excluding potential jurors on the basis of race, and in appropriate cases to ask for judicial intervention to stop defense counsel from exercising race-based challenges.

While members of her office have reported numerous cases where defense counsel appear to be exercising peremptory challenges on the basis of race, trial judges have been reluctant to intervene to stop that practice. Accordingly, in June of 1987, District Attorney Holtzman filed a complaint in state court seeking a judgment declaring that the United States and New York State constitutions prohibit criminal defendants and their attorneys from using peremptory challenges to exclude prospective jurors on the basis of race, religion, sex, or national origin, and prohibit judges from enforcing such challenges. The trial court dismissed the complaint on the ground that such discrimination and its enforcement did not constitute state action. *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup.Ct. Westchester Co. 1988). District Attorney Holtzman's appeal from that decision is pending.

Thus, District Attorney Holtzman has had almost seven years of experience litigating the issue presented by this case. In that time she has observed the frequency with which the issue arises, the reluctance of lower courts to resolve the issue, and the serious harm to constitutional values that occurs when courts enforce race-based challenges, whether made by prosecutors or defense counsel. For these reasons, she urges the Court to grant the writ of certiorari in this case and to hold that the Constitution prohibits courts from tolerating or enforcing race-based challenges, whether made by prosecutors or defense counsel.

2. The National District Attorneys Association, Inc. ("NDAA"), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications, and *amicus curiae* activity carry out its guiding purpose, since its founding in 1950, of reforming the criminal justice system for the benefit of all of our citizens.

For authority to file this brief, reference is made to the attached Motion for Leave to File Brief *Amicus Curiae*.

REASONS FOR GRANTING THE WRIT

Judicial Enforcement of Peremptory Challenges Made by Defense Counsel to Exclude Potential Jurors on the Basis of Race Raises a Substantial Constitutional Question of Great Public Importance Which Should Be Promptly Resolved By This Court.

When a state court enforces the use by defense counsel of peremptory challenges to exclude potential jurors on the basis of race, the state denies the equal protection of the laws to the excluded jurors, to the victims who are thereby denied a hearing of their complaint by their peers, and to all members of the excluded group thereby stigmatized as unfit to provide fair and impartial jurors. In addition to violating constitutional rights, the practice seriously undermines the confidence of the

excluded group and the community as a whole in the fairness of the criminal justice system.

A. The Issue Arises Frequently and Demands Prompt Resolution.

This issue arises frequently in the trial courts, and is creating great uncertainty throughout the nation, uncertainty which can only be resolved by this Court. Many criminal defense attorneys continue to believe, even after this Court's decision flagging the issue in *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986), that the Constitution does not prohibit judicial enforcement of race-based peremptory challenges by criminal defendants or their attorneys. Indeed, the instant Alabama case is only one recent and highly publicized example of the race-based exercise of peremptory challenges by defense counsel. Another example arose in New York, in *People v. Kern*, 137 A.D.2d 862, 524 N.Y.S.2d 521 (2d Dep't 1988), known as the Howard Beach case.

In *Kern*, tried in December 1987, several white teenagers were tried in Queens County, New York, for an unprovoked racially-motivated attack on four black men whose car had broken down in a white residential neighborhood. The trial judge found that the defendants appeared to be excluding black potential jurors on the basis of race and held that the *Batson* rule applied. Both the instant case and the Howard Beach case involve charges of racial violence. In such cases, the defense is especially likely to exclude minority jurors, and in such cases the exclusion of minority jurors has a particularly grievous effect in undermining community confidence in the verdict.

Prior to *Batson*, there were at least two similar examples in Miami, Florida. In one case, white police officers were tried on charges that they had beaten to death a black insurance executive. After the defendants exercised their peremptory challenges to remove all blacks from the panel, the all-white jury acquitted the defendants. The verdict touched off rioting in which fourteen people were killed and $200 million was lost in property damage, inventory losses, lost wages, and lost tourist

dollars. The Florida governor's report on the disturbance specifically identified the practice of excluding blacks from juries in racially sensitive cases as a cause of the riots and a reason for blacks in Dade County to distrust the criminal justice system. *See Andrews v. State*, 438 So.2d 480, 482 n.4 (Fla. Dist. Ct. App. 1983) (Ferguson, J., dissenting), quoting Miami Times, June 23, 1983, p.1, col.1.

Again, in 1984, violence and outrage followed the acquittal of four Miami police officers accused of killing black men. In each of the cases, defense lawyers had used their peremptory challenges to strike all blacks from the juries. *See* The New York Times, Mar. 18, 1984, p.23, cols. 1, 4. The exclusion of qualified jurors solely on the basis of race outraged the community and undermined the legitimacy of the judicial process.

In her own jurisdiction, too, *amicus* Holtzman has regularly observed defense counsel apparently excluding potential jurors on the basis of race in numerous cases involving racial violence. For example, two cases involved a single racially-motivated attack upon three black employees of the New York City Transit Authority. These employees, after finishing the late shift, had stopped for coffee in a white residential Brooklyn neighborhood, where they were attacked by a group of white teenagers. One of the victims was beaten to death with a wooden stick, and a second was seriously injured. One of the perpetrators, indicted for murder, was tried by an all-white jury and convicted of reckless manslaughter. *People v. Bova*, Kings County Indictment Number 3545/82. Another was indicted for murder and first degree assault, tried by a jury of eleven whites and one black, and convicted of third degree assault, a misdemeanor. *People v. Mormondo*, Kings County Indictment Number 3533/82. The defense attorney in *Mormondo* stated on the record that his "concept" of the case was not to have blacks on the jury, and the defense attorney in *Bova*, while not acknowledging discrimination, evinced it by using 15 of his 17 challenges to strike minority jurors and ensure an all-white jury.

Another incident of racial violence in Brooklyn provides yet another example. Three young white men were prosecuted for a

racially motivated assault on three black men who were on their way home from their jobs at the Veterans Administration in Brooklyn. *People v. Wiggins*, Kings County Indictment Number 2694/83. In that case, the trial judge found on the record that the defendants appeared to be excluding black potential jurors on the basis of race, but declined to do more than urge them to stop.

In Brooklyn, as elsewhere, the defense practice of race-based exclusions in prosecutions for racial violence has continued subsequent to *Batson*. For example, a white police officer was tried in Brooklyn in June of 1986 for the fatal shooting of a black teenager. His counsel used peremptory challenges to exclude eight black jurors, leaving only one black on the jury. The trial ended in an acquittal. *People* v. *Vacchio*, Kings County Indictment Number 117/85.

The issue arises not only in cases of racial violence, but also in less inflammatory (if no less serious) contexts. Thus, subsequent to *Batson*, the issue has arisen in Brooklyn trials of two black men charged with narcotics offenses, *People* v. *Duncan*, Kings County Indictment Number 4115/84 (defense counsel stated it was his "duty" to exclude potential jurors on basis of race); a black man charged with the murder of a Hispanic man, *People* v. *Carter*, Kings County Indictment Number 1093/86 (14 of 15 defense challenges against whites); a black man charged with attempted murder of a person of unknown race, *People v. Miller*, Kings County Indictment Number 4577/86 (13 of 13 defense challenges against whites); and a white man charged with narcotics and weapons offenses, *People v. Williams*, Kings County Indictment Number 8282/87 (9 of 9 defense challenges against whites).[1]

A few trial judges have been courageous enough to consider and rule on the issue directly. *See*, *e.g.*, *People v. Kern*, 137

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1 The facts of these Kings County cases are taken from the brief and reply brief for appellant in the pending appeal to the New York State Supreme Court, Appellate Division, in *Holtzman v. Supreme Court*, 139 Misc. 2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988), *appeal docketed* (2d Dep't March 21, 1988).

A.D.2d 862, 524 N.Y.S.2d 521 (2d Dep't 1988) (the Howard Beach case, appeal pending); *People v. Gary M.*, 138 Misc.2d 1081, 526 N.Y.S.2d 986 (Sup. Ct. Kings Co. 1988) (no appeal because of acquittal); *People v. Muriale*, 138 Misc.2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. Kings Co. 1988) (no appeal because of guilty plea); *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988) (declaratory judgment, appeal pending). Others have felt it inappropriate to entertain the issue in the absence of a directive from higher authority. *See, e.g., Carter, Miller, Williams*, and *Wiggins, supra.*

While the issue recurs frequently in the trial courts, it arises far less frequently in the appellate courts. First, if the trial judge permits defense counsel to use race-based challenges, then unless interlocutory relief is available, as in this case, the prosecutor is barred from obtaining appellate review. Second, if the trial judge prohibits defense counsel from using race-based challenges, appellate review may nevertheless be frustrated, whether by an acquittal (*Gary M.*), a guilty plea (*Muriale*), or some other fortuity. For example, in the Howard Beach case the sole juror seated over defense objection was excused for personal reasons before deliberations began, possibly mooting the issue for appeal. Thus, the trial courts continue to wrestle daily with this important constitutional issue without the authoritative guidance they so desperately need. This Court should grant certiorari in order to resolve this important question.

B. The Constitutional Question is Substantial.

1. The Constitutional Rights of Jurors and the Public are Violated.

This Court has long recognized that race discrimination in jury selection violates the equal protection rights not only of criminal defendants, but also the equal protection rights and other legitimate interests of excluded jurors, of other members of the stigmatized group, and of the public. *Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970); *Ex parte Virginia*,

100 U.S. 339, 345 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

The rights of prospective jurors are violated by race-based challenges because the prospective jurors are denied their constitutional right to participate equally in the administration of justice without regard to race. While no person has a right to sit as a juror in any particular case, the United States Constitution guarantees to all persons that they will not be excluded from jury service on the basis of race. Persons who comply with their civic duty to appear when summoned for jury service have a constitutional right to be selected, or rejected, on the basis of their individual characteristics rather than as members of a racial group. *Batson v. Kentucky*, 476 U.S. at 87-88; *Carter v. Jury Commission*, 396 U.S. at 329-30; *Strauder v. West Virginia*, 100 U.S. at 308.

Moreover, other members of the stigmatized group are also denied equal protection of the laws when the jury selection process casts "a brand upon them . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder v. West Virginia*, 100 U.S. at 308; *accord*, *Carter v. Jury Commission*, 396 U.S. at 330.

Finally, the public at large is harmed by race-based challenges because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. at 87. In addition, the public at large is harmed by the "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946).

Thus, once the Court in *Batson* extended to the peremptory challenge phase of jury selection the prohibition on race discrimination, the conclusion inevitably followed that race-based peremptory challenges, like any other form of race discrimination in jury selection, violate the rights of not only defendants

but also excluded jurors and the public. *Batson v. Kentucky*, 476 U.S. at 87-88.

Because rights other than those of the defendant are at stake, the defendant may not avoid the constitutional ban on discrimination merely by noting that the equal protection rights protected by *Batson* can be asserted or waived as the defendant alone sees fit.[2]

Moreover, the excluded jurors and the public experience precisely the same injury from the race-based exclusion of potential jurors, whether the challenges are exercised by prosecutors or by defense attorneys. Indeed, ordinarily the jurors and the public are not told which party challenged which jurors, and their perception is therefore simply that the criminal justice system has determined that jurors of a certain race are unfit to serve in a particular case.[3]

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2 Indeed, there are limits on a defendant's power to waive even those rights that appear to belong solely to the defendant, such as the various trial rights contained in the sixth amendment. *See, e.g., Wheat v. United States*, 108 S.Ct. 1692 (1988) (right to conflict-free counsel does not imply unfettered right to waiver of conflict); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (right to counsel does not imply unfettered right to waiver of counsel); *Singer v. United States*, 380 U.S. 24, 36 (1965) (right to trial does not imply unfettered right to waiver of trial, *i.e.*, to guilty plea); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("process of juror selection is . . . matter of importance, not simply to the adversaries but to the criminal justice system"); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 382-83 (1979) ("independent public interest in the enforcement of sixth amendment guarantees"). Thus, if the *Batson* rule is also required by the sixth amendment, *see Teague v. Lane*, No. 87-5259, argued October 4, 1988, then the defendant's power to waive that right should likewise be limited by the public interest in avoiding race discrimination in jury selection.

3 In a case in Kings County, New York, where a Hispanic defendant was charged with killing a black victim, the defense counsel systematically struck all black potential jurors. *People v. Rosado*, Kings County Indictment Number 4540/83. One black potential juror sent a letter to the District Attorney complaining bitterly of the exclusion and seeking some way to purge the court system of this kind of discrimination. The text of the letter is attached as an appendix.

In part for that reason, almost every other court that anticipated *Batson* in prohibiting race-based peremptory challenges by prosecutors also applied the rule to defense counsel. *See Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated*, 478 U.S. 1001 (1986), *reinstated*, 801 F.2d 871, 872 (1986), *cert. denied*, 479 U.S. 1046 (1987); *People v. Wheeler*, 22 Cal.3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 907 n.29 (1978); *State v. Neil*, 457 So.2d 481, 487 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 490 n.35, 387 N.E.2d 499, 517 n.35, *cert. denied*, 444 U.S. 881 (1979).

But none of these courts decided the precise question presented by this case. The Sixth Circuit rested its holding on the sixth amendment, and the state courts on their respective state constitutions. The cases stand uniformly for the proposition that excluded jurors and the public are equally harmed, whether discriminatory challenges are exercised by prosecutors or defense counsel. They do not, however, address the question presented here: whether the federal equal protection clause protects excluded jurors and the public from that harm.

2. Judicial Enforcement of Defense Counsel's Challenges Constitutes State Action.

The argument most frequently raised against extending the *Baston* rule to defense counsel is that this Court's decision in *Polk County v. Dodson*, 454 U.S. 312 (1981), compels the conclusion that there is no state action in defense counsel's exercise of peremptory challenges and thus that such conduct cannot violate the equal protection clause of the fourteenth amendment. *See, e.g., Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988).

While the issue is indisputably a substantial one, the argument is fundamentally flawed. This Court obviously recognized that *Polk County* was not controlling when it reserved in *Batson* the issue presented by this case. 476 U.S. at 89 n.12. Moreover, the jury selection process at issue here clearly satisfies the test for state action established by a long line of decisions from this Court.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court set forth a two-prong test for state action: "[f]irst, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the state . . . ; [s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." 457 U.S. at 937.

Both prongs of *Lugar* are satisfied here. First, it is well-settled that the peremptory challenge is a state-created privilege and not a right conferred or recognized by the federal constitution. *See, e.g., Gray v. Mississippi*, 107 S.Ct. 2045, 2054 (1987); *Batson v. Kentucky*, 476 U.S. at 108 (Marshall, J., concurring); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919). Thus, the peremptory challenge is a state-created right like the writ of attachment at issue in *Lugar*, and unlike the private takings which were not state action in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

Second, the parties charged with the deprivation here are state actors. The judges who enforce race-based challenges are obviously state officials. The defense attorneys in exercising race-based challenges also "may fairly be regarded as state actors" both because they require the participation and assistance of the court to enforce their challenges, and because of the inextricable involvement of the state in the discriminatory jury selection at issue here.

Each aspect of that involvement, without the others, has been held to be a weighty factor contributing to a finding of state action in prior decisions of this Court. Together, they point irresistibly to that conclusion.

First, potential jurors are exposed to the humiliation of discriminatory challenges only as a result of state coercion, because the state summons people for jury service under threat of criminal prosecution for failure to appear. This Court has repeatedly recognized that state compulsion is a factor pointing

to a finding of state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. at 939; *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 170 (1970).

Second, race-based challenges occur exclusively on state property, in state courtrooms. Because the state is implicated in discrimination by a private restaurant located in a public building, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), it must also be implicated in discrimination by an attorney in a public proceeding in a public courthouse.

Third, race-based challenges occur not merely in a public building, but in a proceeding created and conducted by the state. In *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980), this Court held that "a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment."

Fourth, judicial enforcement is necessary to give effect to defense counsel's race-based challenges, and judicial enforcement of race discrimination is itself discriminatory state action. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelly v. Kraemer*, 334 U.S. 1 (1948).

Fifth, the selection of a jury is an inherently governmental function. A state cannot avoid its obligation to maintain a nondiscriminatory jury selection system by delegating part of the selection process to private parties. In *Nixon v. Condon*, 286 U.S. 73 (1932), this Court held that Alabama could not exclude blacks from voting by delegating to a private political party the task of determining qualifications for primary voters, and permitting that party to bar blacks from the party primary. *Accord, Terry v. Adams*, 345 U.S. 461 (1953). *See also Evans v. Newton*, 382 U.S. 296, 299 (1966) (state action when state delegates management of segregated municipal park). Similarly, the state may not exclude blacks or any racial groups from jury service by delegating the task of jury selection in part to a private attorney, and permitting that attorney to exclude a class of jurors through discriminatory exercise of the peremptory challenge.

There is simply nothing private about the selection of jurors or the use of peremptory challenges. They take place as part of a governmental proceeding, in a public courthouse, for public purposes. Moreover, peremptory challenges are available for use (or abuse when used to discriminate unconstitutionally) solely as a result of state legislation creating them. Finally, they depend on public enforcement from the initial summons that brings potential jurors to the courthouse and subjects them to discrimination, to the final actions of the judge and court officers in seating and then excluding jurors who are so challenged. For each of these reasons, and all of them together, the nexus between the state and the discriminatory acts is sufficient to render judicial enforcement of defense counsel's race-based challenges state action that denies the equal protection of the laws to excluded jurors and to members of the stigmatized group, and violates the rights of the public at large.

3. The Prosecutor has Standing to Assert the Equal Protection Rights of Excluded Jurors and Members of the Public.

In a long line of cases, this Court has recognized a litigant's standing to assert the rights of third parties when three conditions are satisfied: a) a close nexus between the litigant and the third parties whose constitutional rights are at stake, b) serious obstacles to the assertion of the right by the third parties themselves, and c) injury-in-fact to the litigant. Thus, private schools have standing to assert the rights of parents and students to choose private school education. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Likewise, physicians have standing to assert the rights of their patients to contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *cf. Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972) (nonphysician distributor of contraceptives); and to abortion, *Singleton v. Wulff*, 428 U.S. 106, 111-18 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). Beer sellers have standing to invoke their young male customers' equal protection rights to buy beer at the same age as women. *Craig v. Boren*, 429 U.S. 190, 192-97 (1976). Property sellers have standing to invoke their buyers' equal protection rights to

avoid the enforcement of a racially restrictive covenant. *Barrows v. Jackson*, 346 U.S. 249, 255-58 (1953).

In all of these cases the litigants were injured in their business or economic interests, though not in the exercise of their own constitutional rights. The victims whose constitutional rights were violated were ill-situated to litigate on their own behalf, whether for reasons of privacy, or small individual stake in the outcome, or for other reasons. The nexus between the litigants and the victims whose constitutional rights were violated was sufficient to assure the court of vigorous advocacy of the victims' rights.

So too here, the three prerequisites for standing are satisfied. First, the prosecutor is injured in the performance of his or her professional and statutory obligations. The public prosecutor has an undeniable interest in conducting orderly, fair, and lawful criminal trials that command community confidence. That interest is seriously impaired when juries are selected on the basis of race. Unconstitutional discrimination in jury selection may well impair the ability of a jury to engage in impartial fact finding. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). In addition, it undermines public confidence in the fairness of the criminal justice system, *see Batson v. Kentucky*, 476 U.S. 79, 87 (1986), and impairs the prosecutor's ability to investigate and prosecute crimes and to obtain the cooperation of victims and witnesses. Indeed, excluded jurors frequently believe the prosecutor is responsible for discrimination in jury selection, no matter who is in fact responsible, and they hold the prosecutor responsible for correcting the situation (*see* juror letter appended hereto). Thus the prosecutor clearly suffers injury-in-fact.

Moreover, as in the cases cited above, the victims of the discrimination are ill-suited to vindicate their own rights. First, potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their selection or exclusion. Their equal protection rights, therefore, can best be vindicated only if the prosecutor is permitted to challenge what appears to be discrimination in the defendant's exercise of

peremptory challenges while that discrimination is occurring. Second, because all jury challenges are made outside the jury's presence, excluded jurors are ill-situated even to know, much less to allege and prove, which party to the criminal action was responsible for their exclusion and why. Third, an excluded juror would be barred from seeking damages by the qualified immunity of judges, *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), and could not easily obtain declaratory or injunctive relief because it would be difficult to demonstrate the likelihood of a repetition for any particular juror. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983); *Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976). And fourth, the practical barriers to suit by an excluded juror are at least as great as the legal barriers, because of the small stake of any individual juror.

Finally, the nexus between the prosecutor and the excluded juror is close enough to assure vigorous advocacy of the juror's rights. The public prosecutor has an official duty to assure that jury selection proceeds in a constitutional manner. That interest is virtually identical in this case to the interest of the excluded juror in avoiding unconstitutional exclusion from jury service. Moreover, the nexus is strengthened by several additional facts. First, excluded jurors frequently hold the prosecutor responsible for unfair jury selection practices, no matter who is in fact responsible. Second, the prosecutor has an interest in assuring that potential jurors are satisfied with the fairness of the jury selection process because he or she has the ultimate responsibility for compelling them to appear for jury service by prosecuting them if they intentionally fail to respond to a jury summons. Third, the prosecutor's interest in preventing discrimination in jury selection is supported by his or her interest in impartial fact finding and in public confidence in jury verdicts.

Thus, because the injury to the prosecutor in this case is clear, the nexus to the excluded jurors strong, and the barriers to suit by the excluded jurors substantial, the prosecutor has standing to assert the constitutional rights of potential jurors to be considered for jury service without regard to race.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to decide the important constitutional question presented by this case.

Respectfully submitted,

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November 28, 1988

APPENDIX

11/21/84

Elizabeth Holtzman
District Attorney
210 Jorelmon Street
Brooklyn, N.Y.

Dear Mrs. Holtzman:

I am not sure that I am writing to the right person, if not possible you will be able to put this bit of information in the right place.

I am writing concerning the New York (Brooklyn) Judicial system. Which has turned out to be one big joke, a waste of time and the tax payers money.

I am a common laborer not professing to know law, but I do have common sense and understanding. I was summon to Supreme Court 11/15/84 to serve as a possible Trial Juror. After walking about for four days, I was finally called and sent to court room 574 part II, 11/21/84. Presiding Judge Leone, defendant Mr. Rosada. There were a least sixty or seventy people sent to room 574 to pick a jury of twelve plus two alternates. The majority of the groups sent were Blacks. Mr. Rosado is being tried for Murder 11/23/84.

After telling us what the law expected of us as possible Jurors, which as the Judge stated was common sense and a promise from each of us to be fair and impartial then the selection began; it made no difference to the Judge the District Attorney or the defendants Lawyer that the majority of the prospective Jurors were Black. They manage to pick thirteen (13) whites and one black *second* alternate making sure of an all white Jury.

We were also reminded that we if selected as a Juror, were not suppose to take Sympathy into the founding of a Verdict. But Mrs. Rosado was in the court room while the selection was being made she is about seven months pregnant. She was seated right a long with the prospective Jurors and if that isn't a sympathy pitch I've never seen one. Some of us do have common sense.

And so I ask you Mrs. Holtzman if we Blacks don't have common sense and don't know how to be fair and impartial, why send these Summons to us? why are we subject to finds of 250.00 if we dont appear and told it's our civic duty if we ask to be excused. Why bother to call us down to these courts and then over look us like a bunch of niave or better yet ignorant children. We could be on our jobs or in schools trying to help our selves instead of in court house Halls being Made fools of.

I will not sign my name because I am a little person and will surely get the short end of the stick. I just thought it was time for some one to Know about the Judicial system and if there is anything that can be done or anyone who wants to do it, the matter will be taken care of. A Copy of this letter will be sent to Eye Witness News.

Thanking You